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No. 937

In the

Supreme Court of the United States

OCTOBER TERM, 1957

LECUNO OIL COMPANY,
Petitioner,

against

T. P. SMITH, JR., Individually and as Trustee, HAZEL COCKE JOBE and Husband, CLEVE B. JOBE, CAL COCKE TRAMMELL, and WINSTON TAYLOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas entered on September 26, 1957. (R. 10.)*

OPINIONS BELOW

The judgment of the 71st District Court of Harrison County, Texas, is contained on Page 133 of the Transcript

*References marked "R" are to the Certified Record.

of the proceedings of the trial Court which is produced at page 1 of the Certified Record.

The opinion of the Court of Civil Appeals is reported at *306 S. W. 2d 190*, and is printed in the Appendix at Page 4.

The order of the Supreme Court of the State of Texas denying rehearing on its order refusing to grant a Writ of Error to the Court of Civil Appeals is unreported and printed in the Certified Record at Page 20 .

JURISDICTION

The judgment of the Court of Civil Appeals, affirming the judgment of the District Court was entered September 26, 1957. (R. 10.) Rehearing was denied October 24, 1957. (R. 12). Application for Writ of Error in the Supreme Court of Texas was refused January 15, 1958. (R. 20.) Rehearing was denied February 26, 1958 (R. 20.)

The jurisdiction of the Court is invoked under *28 U. S. C., Sec. 1257(3).*

The federal questions in this cause pertaining to rulings of the Office of Price Stabilization and the Federal Power Commission were raised seasonably in the lower courts as shown by the following statement of the Court of Civil Appeals, *Lecuno Oil Co. v. Smith, et al., 306 S. W. 2d 190*, at page 191-192:

> " * * * The defendants *(Petitioner here)* responded by motions to abate the suit for want of necessary parties and failure of appellees to exhaust their administrative remedies before the Federal Power Com-

mission. These motions were overruled. In an original and later an amended answer, appellants *(Petitioners here)* pled defensively that the subject-matter of controversy was within the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U. S. C. A. Sec. 717 et seq., and that all rates, charges and field prices or changes therein for the royalty gas must be set by that agency. Answering further, it was alleged that during a part of the time since production another Federal Agency, the Office of Price Stabilization, had controlled the field price of gas produced under the leases involved, and had set a price of 10¢ per MCF at the wellhead and that appellees having been paid the 10¢ ceiling price, they could not come back after the expiration of the law creating the Office of Price Stabilization and sue for a greater price than had been set. For further answer, the appellant denied all the allegations of plaintiffs' petition, though it admitted it had taken gas from the wells sued upon by appellees from unitized acreage under the rules and regulations of the Railroad Commission, but insisted that appellant had paid all the royalties due to the appellees. Attached to the answer as an exhibit is the order of the Director of the Office of Price Stabilization and orders of the Federal Power Commission, relied upon by appellant * * *."

In the trial of this cause, the Trial Court repeatedly overruled the petitioner's attempts to introduce evidence in support of its contention that certain rulings of the two federal agencies in question were a bar to Respondent's suit. These points were appropriately carried forward to the Court of Civil Appeals and overruled. The Supreme Court of Texas refused a Writ of Error thereby necessitating a Petition for a Writ of Certiorari by this Court to the Court of Civil Appeals at Texarkana, Texas.

QUESTIONS PRESENTED

(1) Whether a trial court can refuse to take judicial notice of the rules and regulations promulgated by the Administrator of the Office of Price Stabilization, which rulings were properly contained in the Federal Register, despite the express provisions of *44 U. S. C., Sec. 307* that " * * * The contents of the Federal Register shall be judicially noticed * * *."

(2) Whether a trial court can exclude from evidence, upon the grounds of hearsay and irrelevancy, the actions taken by the Administrator of the Office of Price Stabilization in establishing a maximum price to be paid for gas produced in a certain field and establishing the costs in making this gas available to the nearest market, in an action between a royalty owner and the producer as to the amount of royalty to be paid to said royalty holder upon this gas.

(3) Whether a court may enter a judgment after the termination of the Office of Price Stabilization, which judgment allows to the complainant the difference between the ceiling price established by the Office of Price Stabilization and the price the complainant could have received except for the lawful and necessary intervention of the Office of Price Stabilization under an act of Congress.

(4) Whether a purchaser of natural gas may be required to pay a price retroactively in excess of the ceiling price placed upon such gas by the Office of Price Stabilization during its existence, after the expiration of the act of Congress creating such agency.

(5) Whether a royalty holder who is dissatisfied with the rate schedules filed with and approved by the Federal Power Commission, which includes the producer's allowable costs of transporting the gas to the nearest market, can file a suit to determine the allowable costs of transporting the gas to market without first exhausting the remedies of review provided for by the Federal Power Commission.

(6) Whether in a suit between a royalty holder and producer, a trial court can exclude from evidence, upon the grounds of hearsay and irrelevancy, the actions of the Federal Power Commission in approving the charge of transporting gas to be used in Interstate Commerce to the nearest market which charge was filed by the producer as part of his rate schedule, where the issue before the court is the proper charge for said transportation.

(7) Whether a purchaser of natural gas can be required to pay a price in excess of that price frozen by the Orders of the Federal Power Commission by its orders 174, 174a, and 174b, upon the ground that such orders are hearsay and irrelevant in a proceeding involving the costs of transportation of natural gas into Interstate Commerce.

The Petitioner furthermore, adopts all points of error asserted in its application for Writ of Error to the Supreme Court of Texas, which this Honorable Court will be incidentally concerned with if this Petition for Certiorari is granted.

STATUTES AND REGULATIONS INVOLVED HEREIN

I

44 U. S. C., Sec. 307, as follows:

"No document required under Section 305(a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in Section 302 of this title; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under Section 305 of this title, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. *The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number.* (July 26, 1935, c. 417, Sec. 7, 49 Stat. 502.)"

II

Defense Production Act of 1950, 50 U. S. C. App., Sec. 2108(e)(iii), as follows:

"* * * Except as provided in this subsection, the pendency of any protest under section 407 of this title

(Section 2107 of this Appendix), or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 409 or 706 of this Act (Section 2109 or 2156 of this Appendix) or section 371 of Title 18; *nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under this title (Sections 2101-2110 of this Appendix).*" *Sept. 8, 1950, c. 932, Title IV, Sec. 408, 64 Stat. 808.*

III

The rulings and regulations of the Office of Price Stabilization and the Federal Power Commission pertinent hereto are set out in the Appendix, pages 17 et. seq.

STATEMENT OF THE NATURE AND RESULT OF THE CASE

The Respondents filed this suit against the Petitioner in April, 1954, alleging that the Petitioner had failed and refused to account to the Respondents for the full amount of royalties under oil, gas and mineral leases in Harrison County, Texas. The Respondents filed a supplemental petition in January, 1956, wherein they alleged that the Petitioner had deducted 2¢ per MCF from the price of the gas sold and had thus failed to account for the full one-eighth (1/8) of the royalty which the Respondents were due to collect under their oil, gas and mineral leases. The 2¢ was claimed by the Petitioner to be the actual cost of transporting, processing and delivery of gas shipped in interstate commerce because the gas could not be sold at the wellhead. The Petitioner filed a plea in abatement praying

the Court to abate the suit because the Respondents had not exhausted their administrative remedies before the Federal Power Commission, and that the Federal Power Commission had accepted the rate of 2½¢ as a proper charge for transportation, gathering and delivery of the gas, and further that the Respondents would have to first apply to the Federal Power Commission for relief before filing the suit. (R. 1, pp. 10, 17.) This plea in abatement was overruled (R. 1, p. 26). The Petitioner then answered that the Respondents could not maintain their suit because, under the Natural Gas Act of the United States, all rates, charges and field prices, as well as transportation charges, for gas sold to be shipped in interstate commerce were within the exclusive jurisdiction of the Federal Power Commission, and that the Respondents had not exhausted their administrative remedies. This plea in abatement was overruled and the Petitioner further answered that the Office of Price Stabilization of the United States, acting in accordance with authority granted by the Congress, had set a price of 10¢ at the wellhead; and, that, Respondents having admitted they had been paid the 10¢ ceiling price, they could not now come back (after the expiration of the Office of Price Stabilization) and sue for a greater price than the Office of Price Stabilization had set. (R. 1, p. 29.)

The Petitioner further denied all of the allegations of Respondents' petition though it admitted that it had taken gas from the wells sued upon by Respondents from unitized acreage under the rules and regulations of the Railroad Commission, but that Petitioner had paid all of the royal-

ties due under the oil, gas and mineral leases to the Respondents; that it had paid the price fixed by the Office of Price Stabilization, and had charged the transportation costs, processing costs and delivery costs approved by the Federal Power Commission. It attached to and made a part of its answer the order of the Director of the Office of Price Stabilization of the United States, fixing the ten-cent maximum price and the orders of the Federal Power Commission, freezing all prices for transportation, processing and delivery, as issued in June, 1954. However, during trial, the trial court repeatedly prevented any efforts by the Petitioner to introduce any evidence in support of its contention that the actions of the Office of Price Stabilization and Federal Power Commission were a bar to their suit (R. 2, pp. 91-141.)

In addition to the answer, the Petitioner filed a cross-action, to construe the leases in question and also the division orders, but the errors in this regard are not directly the concern of this Honorable Court.

There was no dispute between the parties as to the charge of one fourth (¼) cent for dehydration of the gas; all admitting and agreeing that this charge was proper under the contract and circumstances. (See Court of Civil Appeals Opinion, p. 5, R. 9.)

The Trial Court refused to grant the Petitioner any relief on its cross-action but, upon a trial, submitted to the jury the issue as to the reasonable cost of transporting, processing and delivery of the gas, and an issue as to whether

the Respondents had been paid one-eighth (1/8) of the market value at the well among other issues. (R. 2.) Following the verdict of the jury, the Petitioner filed a motion for judgment, which was refused by the Court and the Court granted the motion of Respondents for judgment. Motions for a new trial were timely filed and overruled. Appeal was then duly perfected by Petitioner to the Court of Civil Appeals at Texarkana, Texas, whereupon judgment of the trial court was reformed and affirmed. The Petitioner thereupon, filed its Application for Writ of Error to the Supreme Court of Texas which was denied, as was Petitioner's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

There has never been an instance in Petitioner's knowledge where a court has excluded consideration of the duly promulgated rulings and actions of a Federal Administrative Agency upon the absurd grounds that such rulings and actions were hearsay to an affected party, and irrelevant to be considered in an action directly concerned with the subject matter acted upon by the Federal agency in question. The trial court refused to take judicial knowledge of the orders of the Office of Price Stabilization! This point is so elementary, the Petitioner hesitates to burden this court with authorities. In the Trial Court in this matter the Petitioner plead the rulings of the Office of Price Stabilization and sought to introduce the rulings into evidence. Furthermore, the Petitioner sought to elicit the fact that the Office of Price Stabilization had acted in putting a

ceiling price on the gas in question. However, on each and every occasion the Trial Court held that the actions of the Administrator were hearsay to the Respondents. (R. 2, pp. 91-141.)

Not only were the original orders of the Administrator admissible, but the court had to take judicial notice of these rulings and regulations. *44 U. S. C., Sec. 307* expressly states:

> "No document required under section 305(a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 302 of this title; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 305 of this title, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. *The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number.* (July 26, 1935, c. 417, & 7, 49 Stat. 502.)" (Emphasis added.)

Therefore, the Petitioner submits that the error of the Trial Court in holding that the orders of the Administrator of the Office of Price Stabilization were hearsay and irrelevant as to the Respondents on a point directly passed upon by the Administrator, and furthermore, in ignoring the express provisions of *44 U. S. C., Sec. 307*, requiring judicial notice of said acts, are justifiable reasons for this court to grant a Writ of Certiorari in this cause.

II.

The Trial Court below very strangely and absurdly ruled that the actions of the Administrator of the Office of Price Stabilization, acting under authorization by the Congress and President of the United States, in setting a ceiling price on the gas upon which the Respondents' royalties were based, were hearsay and irrelevant to the Respondents in a suit for an accounting for royalty based upon a price in excess of said ceiling. Surely the actions of Federal agencies are not hearsay as to the regulated public! To so hold would be analogous to a holding that a taxpayer can refuse to be bound by the income tax rules and regulations promulgated by the Treasury Department upon the grounds of hearsay. This principle is too elementary for dispute. The acts of the Legislative, Executive and Administrative branches of the government cannot be hearsay in a suit directly involving the subject-matter acted upon by the particular governmental body since they are operative acts of law.

III.

In this cause the courts below rendered a judgment retroactively for the Respondents for a period of time during which the Congress of the United States had set up an administrative agency to establish a ceiling on the price to be paid for gas in the Wascom Field in Texas and also to freeze the amount to be charged for the transporting, compressing and dehydration of this gas at the nearest market. The judgment in question was rendered after the act creating the Office of Price Stabilization terminated and was for the difference between the ceiling price set by the Office of Price Stabilization, and paid by the purchaser, and the amount the Respondents claimed they should have received.

The Defense Production Act of 1950, as amended, *Title 50 U. S. C. A. Appendix, Sec. 2108* expressly provides:

> "• • • except as provided in this subsection, *no retroactive affect shall be given to any judgment* setting aside a provision of a regulation or order issued under this title." (Emphasis added.)

In *Stanolind Oil & Gas Co. v. Freehill, 205 F. 2d 305 (Em. App. 1953)*, the Stanolind Oil Company, et al., sued the Director of Price Stabilization to set aside an order fixing the price of gas in the Woodlawn Field in Texas (an adjoining field to the one in the case at bar), at 10¢ M. C. F. after the Office of Price Stabilization had terminated. Stanolind's object was to invalidate the ceiling price on the gas in question retroactively so it could recover the difference between the ceiling price set by the Office of Price Stabilization and the price set out in a contract of

sale with the Mississippi River Fuel Co., which contract price was 12¢ per M. C. F. during the existence of the Office of Price Stabilization. The Court held, inter alia, that by reason of the provisions of Sec. 408(d)(2) of the Defense Production Act of 1950, as amended, *Title 50 U. S. C., Appendix Sec. 2108*, prohibiting retroactive effect when an order of the Office of Price Stabilization ceases to be, that Stanolind could not maintain this suit. See also *Atlantic Meat Co. v. Porter, 155 F. 2d 537 (Em. App. 1946); Schwartz v. Clark, 163 F. 2d 751 (Em. App. 1947); Talbot v. Woods, 164 F. 2d 493 (Em. App. 1947); Colonial Village Apts. v. Henderson, 202 F. 2d 156 (Em. App. 1953)*. All of these cases succinctly illustrate that the provisions of the Defense Production Act under which the Office of Price Stabilization was created were not intended to be retroactive in any respect except for criminal violations. Judge Magruder in *Standard Kosher Poultry v. Clark, 163 F. 2d 430 (Em. App. 1947)*, concisely stated the logical reason why the judgment of the court in the case at bar is a gross violation of the Statutes above referred to: (page 432)

> "It would be an odd thing if a judgment of this court rendered after the general termination of the act were to be given greater effect than if the judgment had been rendered before."

This court should bear in mind that the judgment complained of could not have been entered during the pendency of the Office of Price Stabilization. How can such a judgment now be justified after the expiration of said agency? This Petitioner submits that this Court should grant the Writ of Certiorari as prayed for herein so as to

correct this illogical interpretation of the Defense Production Act of 1950 which allows the Respondents to compel the Petitioner to violate a law of the United States.

IV.

The Petitioner plead and attempted to prove that the contract of sale for the gas in question was filed under the rules of the Federal Power Commission and became a rate schedule; and furthermore, that the Respondents had not applied to the Federal Power Commission for relief. The Petitioner had included within said rate schedules, as filed, 2¼¢ for transporting, handling and compressing of the gas. Therefore, under the Rules of the Federal Power Commission, Petitioner was unable to change the rates, charges for transportation and service, without a Commission Order, and since the respondents had not complained to the Federal Power Commission, though the order of the Commission froze the rates as of June, 1954, the Respondents' suit was premature. Upon hearing the petitioner introduced the certificate of convenience and necessity (R. 2). The petitioner offered in evidence the orders of the Federal Power Commission, freezing all *charges* and *prices*, being Orders Nos. 174, 174-A and 174-B. (Appendix, pages 28, et. seq.)

In the application for the certificate of convenience and necessity as required by Orders Nos. 174, 174-A and 174-B of the Federal Power Commission, the petitioner was required to file said application for certificate of public convenience and necessity, in which application it was shown that a charge of .0225¢ or 2¼¢ was being charged

for gathering, compressing, processing and delivery of the gas.

It was shown on the last page of the exhibit that the "value fixed on the gas by the State of Texas for assessment of the production tax .0225, being allowed for gathering, compressing and dehydrating." Attached to the rate schedule as filed under the compulsion of the orders of the Federal Power Commission and in the letter of transmittal (R. 1, Tr., Vol. 2, p. 15, Petitioner's Exhibit No. 50), there was attached a bill showing that .0225¢ was being charged for gathering, compressing and dehydrating of the gas. This was received by the Federal Power Commission as the rate schedule.

Then, in the application for change in rate schedules (Petitioner's Exhibits 13 and 14), it was shown:

> "That .0225¢, being allowed for gathering, compressing and dehydrating."

It was likewise shown in a sample billing which was attached to the application for increase that .0225¢ was being charged for transporting, dehydrating and compressing the gas; thus, this entire rate of .0225¢ had been filed and accepted by the Federal Power Commission.

The Petitioner offered the letters from the Federal Power Commission, showing that the rate schedules had been filed by the petitioner and accepted by the Federal Power Commission.

It is a well settled rule of administrative law that where an administrative agency has jurisdiction and has acted on a particular object, a complainant must first exhaust

all of his remedies before such agency before he can get a judicial review. *F. P. C. v. Union Producing Co., 230 F. 2d 36 (D. C. Cir. 1955), cert. den., 351 U. S. 97; Union Oil Co. v. F. P. C., 236 F. 2d 816 (D. C. Cir., 1956); Petersen Baking Co. v. Bryan, 290 U. S. 570 (1934).* The cases argue the point to its conclusion that where Congress steps in a particular area and creates an administrative agency, the courts must await final decision by the agency. This is so for two reasons: (1) it brings unformity of decision; and (2) it gives the court the benefit of expert opinion of the men whose business it is to understand the operation, the transportation and delivery of gas in the United States. The Petitioner did not want to file schedules! The Petitioner did not want to file its rates and its records of business; neither did Petitioner want the price frozen which it charged for transportation, processing and delivery of the gas! The orders of the Federal Power Commission made it necessary for the Petitioner to comply; yet the lower courts by their judgments will compel the Petitioner to violate the rules of the Federal Power Commission which forbid any rate or price increases without prior approval. The Respondents should first be required to exhaust their remedies before the Federal Power Commission. If this court does not require the Respondents to exhaust their remedies, then the courts of all of the states shall have equal power with the Federal Power Commission to pass on the rates and charges of oil and gas. The Federal Power Commission will not have exclusive jurisdiction to pass on the problems for which it was set up for. We shall

then have a body of laws from the Federal Power Commission and federal courts and a body of laws from intervening state courts. Such a result should be prevented by this court by the granting of a writ of certiorari.

V.

As shown above, the Federal Power Commission has accepted the charges made by the Petitioner for transporting and processing the gas to market. The trial Court excluded any mention of the actions of the Federal Power Commission upon the issues before the court upon the grounds of hearsay and irrelevancy. As pointed out in ground I., *supra*, such a holding is completely absurd. The actions of an administrative agency cannot be hearsay!

The Federal Power Commission froze the price to be paid for all gas in all of the fields of Texas by its Orders No. 174 *et. seq.*, above referred to and as fully shown in the Appendix. By the judgment complained of, and the orders of the State Court, the Petitioner will be required to pay 3½¢ per thousand cubic feet (M. C. F.) *more than the price frozen by the Federal Power Commission.* If the Petitioner pays such judgment, the Federal Power Commission can forfeit its certificate and take away its right to transact business! If it does not pay the State Judgment, the Respondents will levy upon and sell its property under execution! What recourse can petitioner have unless this Court grants a Writ of Certiorari? Where are its rights to be protected?

It is obvious that the Courts in this case have shown a broad lack of familiarity with federal administrative law,

or further, that they have decided that federal administrative agencies should neither control the price of gas in Texas, nor regulate the cost of the interstate transportation of natural gas in Texas. Where can a producer-purchaser get relief? Hundreds of such cases will arise from "Pandora's Box" if this decision is not revised and the obvious errors corrected that affect the laws of the land.

We respectfully pray the Court to grant Certiorari, summarily reversing this cause and remanding it to the District Court of Harrison County, Texas, or reverse and render judgment for the petitioner; alternatively, to grant the Writ of Certiorari and set the matter down for a hearing upon the merits.

CONCLUSION

For the foregoing reasons, this Petitioner for Writ of Certiorari should be granted, and the judgment below summarily reversed and remanded for a new trial, or be reversed and rendered for Petitioner, or alternatively to grant the writ of certiorari and set the matter down for a hearing upon the merits.

Respectfully submitted,

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April 18, 1958

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JUDGMENT OF COURT OF CIVIL APPEALS

BE IT REMEMBERED that on Thursday, the 26th day of September, A. D. 1957, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, met in the City of Texarkana, Texas. Present T. [illegible]. Chadick, Chief Justice, Wm. J. Fanning, Associate Justice, Matt Davis,

Associate Justice, and M. E. Merrill, Clerk, when the following proceedings, among others, were had, to-wit:

LeCuno Oil Company, No. 6973	Appellant,	Appealed from the District Court of
T. P. Smith, Jr., et al.,	Appellees.	Harrison County.

This cause came on to be heard on the transcript of the record, and the same being inspected, the court is of the opinion that the judgment of the trial court is correct except that it rendered a take nothing judgment on defendant's cross-action. And it appearing to the court that in that respect there is a lack of necessary parties to the action, the Court is of the opinion that the cross-action should have been dismissed and that the judgment of the trial court should be reformed and such cross-action dismissed, and as so reformed the judgment should be affirmed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the judgment of the trial court on the defendant's cross-action be and the same is hereby dismissed, and the judgment is hereby reformed in that respect and as so reformed the judgment of the trial court is affirmed; that the appellees, T. P. Smith, Jr.; T. P. Smith, Jr., Trust; Hazel Cocke Jobe and husband, Cleve B. Jobe, Cal Cocke Trammel and Winston Taylor, do have and recover of and from the appellants, Leonard Culbertson Dan Lester and Summers A. Norman, doing business as LeCuno Oil Company, and of Fidelity and Deposit Company of Maryland, the full amount of the judgment recov-

ered in the court below together with all costs in this behalf expended both in this court and the court below for all of which execution may issue and this decision be certified to the court below for observance.

OPINION OF COURT OF CIVIL APPEALS

LeCuno Oil Company, Appellant, } Appeal from District
No. 6973 vs. } Court of Harrison
T. P. Smith, Jr., et al., Appellees. } County, Texas.

This is an accounting case. The judgment of the trial court is reformed, and as reformed, affirmed.

The appellees filed this suit against the LeCuno Oil Company and its several partners in April of 1954, alleging that LeCuno had failed and refused to account to them for the full 1/8 (royalty) of the price received by LeCuno for gas at the well. The defendants responded by motions to abate the suit for want of necessary parties and failure of appellees to exhaust their administrative remedies before the Federal Power Commission. These motions were overruled. In an original and later an amended answer, appellants pled defensively that the subject-matter of controversy was within the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act and that all rates, charges and field prices or changes therein for the royalty gas must be set by that agency. Answering further, it was alleged that during a part of the time since production another Federal Agency, the Office of Price Stabilization, had controlled the field price of gas produced under the leases involved, and had set a price of 10¢ per MCF at the wellhead and that appellees having been paid the 10¢ ceiling price, they could not come back after the expiration of the law creating the Office of Price Stabilization and sue for a greater price than had been set. For further

answer, the appellant denied all the allegations of plaintiffs' petition, though it admitted it had taken gas from the wells sued upon by appellees from unitized acreage under the rules and regulations of the Railroad Commission, but insisted that appellant had paid all the royalties due to the appellees. Attached to the answer as an exhibit is the order of the Director of the Office of Price Stabilization and orders of the Federal Power Commission, relied upon by appellant. Then by cross-action LeCuno prayed the court to construe the leases involved and to reform the division order entered into between the parties.

Trial was before a jury on two special issues, and pursuant to jury answers, judgment was entered awarding an aggregate amount of $8,631.63 to the appellees, apportioned in accordance with their respective interest in the unitized leased premises, and denying appellant any relief on its cross-action.

Appellant brings forward 20 points of error and cites 30 odd cases and Rules in support of its contention. Appellees present eight counter-points and cite two cases and two rules. High respect for the opinion of counsel, and the earnestness with which it is urged that the price-fixing orders of the OPS and the rate-making authority of the FPC are involved in this case, has caused this court to study such contentions with unusual interest.

Preliminary to a discussion of contention last mentioned, the relationship of the parties should be noted. This relationship as shown by the record is distinguishable from

that found in most cases of this kind. LeCuno, as assignee, holds the mineral leases which initially fix the rights of the parties as lessors and lessee, then in its capacity as lessee LeCuno, with ratification by the lessors, unitized the acreage creating a changed relationship between it and the original lessors. On occurrence of gas production the original lessors executed and delivered to LeCuno division orders creating still a different contractual relationship. In the usual cases growing out of mineral development the lessee or producer and the gatherer or pipe line owner are different persons or corporations, while here LeCuno is both producer and pipe line operator. The contractual relationship created by the division orders permitted LeCuno as a producer, if it chose, to make a contract with LeCuno as gatherer, thus having the privilege of contracting with itself respecting prices of gas at the wellhead. However, no sale of that nature is under examination here. It is in evidence that LeCuno took delivery of the royalty gas involved at the wellhead, ran it through its processing plant and delivered it to certain interstate gas transmission companies under contracts of sale which appellees had no part in making at a price agreed upon between LeCuno and the transmission companies. Such sales to the transmission pipe lines were bona fide arm's length transactions as between LeCuno and the transmission lines so far as this record reveals. Under the contractual relationship described above, LeCuno's division orders requiring it to account to the appellees for their royalty gas on the basis of "*the price received at the wells by LeCuno*" would

require that LeCuno exercise the highest good faith in any contract it entered disposing of the royalty owners' gas.

Most of the gas involved in this litigation was sold under a contract between LeCuno and the Mississippi River Fuel Corporation and what is said with respect to it is applicable to all other transmission lines involved.

Discussing first the OPS maximum price order, this record shows such order fixed a maximum price of *10¢ per MCF at the wellhead* on gas delivered by LeCuno to Mississippi River Fuel Corporation. The order does not fix a charge for gathering, transporting and processing gas. Throughout the time the OPS exercised jurisdiction, LeCuno was permitted and did charge and collect $.1225 per MCF for gas delivered. The transmission company paid monthly and at times divided the payment into two checks, one reflecting 10¢ per MCF for gas and the other a charge of $.0225 per MCF of gas apparently allowing $.0225 as a gathering and processing charge. There is no evidence showing the OPS set, approved or was even aware that a charge for gathering and processing was being received by LeCuno.

Under the circumstances of this case as outlined in the preceding paragraphs, LeCuno as a gatherer and processor has agreed with appellees to pay them the price LeCuno received for the royalty gas, and it is undisputed that while the OPS order fixing a maximum price of 10¢ at the wellhead was in effect, appellees' royalty gas was sold, not at the wellhead, but after being processed and delivered at the

tailgate of LeCuno's plant, and LeCuno received $.1225 per MCF for such gas.

There is nothing in the record to show that the OPS set or approved the $.0225 additional charge except that no action was taken to disallow the charge. If the $.0225 charge be considered as having been approved by FPC, it resulted in a windfall gain because under the jury findings the cost of gathering, etc., was only $.0125. Considering it as a windfall or excessive allowance, LeCuno acting in the best of good faith should account for the excess to the royalty owners because the excess was received by it as a result of the sale of the royalty gas.

Following the U. S. Supreme Court decision of June 7, 1954, in Phillips Petroleum Co. v. Wisconsin, et al., 347 U. S. 672, LeCuno as a precautionary measure while denying the jurisdiction of the FPC, filed a rate schedule and began operating under that agency's regulations. LeCuno by the simple act of filing with FPC its contract with Mississippi River Fuel Corp'n, Texas-Eastern Transmission Corp'n, and other interested transmission lines established as its rate the price set up in the respective contracts under rules of the FPC. These contracts each provided for a delivered price after processing (not a wellhead price) and in these contracts no provision is made for a gathering and processing charge, as between the respective parties. In this latter respect the only time such charge appears in the record is where a note of explanation is appended to an invoice offered as an exhibit. The explanatory note said

that $.0225 was permitted to be deducted from the sale price by the State of Texas in computing taxes.

The gas division orders executed by the appellees and delivered to LeCuno have a standard provision reading as follows: "Gas received under this division order shall be paid for to the parties entitled thereto according to the division of interest set out above *at the price received at the wells by LeCuno.*" A construction of the whole language of each of the gas division orders requires a conclusion that the orders themselves in so far as a sale of gas is concerned are a contract by the royalty owners to sell the royalty gas to LeCuno as the same is produced for the price received for it by LeCuno at the well, and do not constitute a sale of the gas in place. As shown in connection with another question later discussed in this opinion, there was no market for the gas at the well and the price received by LeCuno for the gas and for which it is accountable to the appellees would be the amount received by LeCuno for the gas, less the cost of dehydration, gathering, transporting and processing.

Respecting the FPC rates, the regulatory body simply made no effort to and did not fix a rate as between LeCuno and these litigants. The gathering and processing charge is an incident of cost occurring prior to delivery and is a part of the rate agreed upon by LeCuno and its gas purchasers and therefore included in the over-all rate FPC approved. This charge is one of the several variable factors making up the unit rate. It is not treated either by LeCuno, the

transmission line purchasers or the FPC as a separate or severable charge but is merged into the fixed rate, without regard to amount or whether there in fact is any cost of gathering and processing. The FPC wisely made no effort to come between the producer and its royalty owners and left the matter of costs and charges as between them to their own arrangement. The FPC rate sets an over-all amount per MCF of gas and no more tries to say what the gatherer will pay his producers for gas than it tries to tell him what he will pay his laborers for labor or suppliers for material. The regulatory authority of FPC is not involved in this suit. Nor can it be said that that agency has exclusive jurisdiction of the controversy between these litigants or even that there is any controversy between the litigants that the FPC in the exercise of its lawful authority might determine, see Magnolia Petroleum Co. v. Texas Illinois Natural Gas Pipeline Co., F. Supp. , 4 Oil & Gas Reporter, 408-411.

Simply rendered it is the position of the appellant that: (1) It has accounted to the appellees for all royalty due them under maximum prices fixed by the OPS and the rates promulgated by the FPC, respectively; and (2) that if these two agencies had no jurisdiction, then the extent of its liability is the payment of 1/8 of the amount received for the gas at the well or the payment of 1/8 of the amount received at the point of delivery, less the actual cost of transporting, processing, dehydrating and delivering it.

For the purpose of the accounting phase of this litigation, all parties agree that division orders executed by the

appellees and delivered to the appellant are the measure of their respective rights and state the amount of production each of the parties is to receive and provide that the pay therefor is to be ⅛ of the price which LeCuno receives for gas at the well. LeCuno contracted with the Mississippi River Fuel Corp'n to sell it the gas produced during the first two years of the contract at 12¢ per MCF and during the next two years thereof at 13¢ per MCF. This contract was operative at all times material to the suit. It is shown without question that there existed no market for the gas at the well and that the gas was not sold at the well but at the tailgate of the processing plant, where it went into interstate gas transmission lines. Appellees concede that the cost of dehydrating is $.0025 cent per MCF.

Appellant contends and appellees agree that the fact to be found by Special Issue No. 1 is uncontroverted and that no issue of fact was raised by the proof. There is no contention made that the submission of Special Issue No. 1 impinged upon any right or privilege of the appellant. The submission of an immaterial issue is harmless under the circumstances. See Dofner v. Branard, 236 S. W. 2d 544, er. ref.; Thomason v. Durch, 223 S. W. 2d 320, er. ref.

The trial judge submitted to the jury Special Issue No. 2 reading as follows:

> "What do you find from a preponderance of the evidence is a reasonable charge, if any, for gathering, transporting and compressing the gas used or sold off the land in question?"

The jury answered it: "1.25 cents per M.C.F." Appellant's objection in the trial court to the submission of this issue was:

> "The defendant objects and excepts to Special Issue No. 2, because there is no lease of the plaintiffs which requires the defendant to make a reasonable charge for gathering, transporting and compressing the gas used or sold off the land in question. The measure of defendant's responsibility is the payment of 1/8th of the amount received for the gas at the well, or the payment of 1/8th of the amount received at the point of delivery, less the actual cost of transporting, processing, dehydrating and delivering. In no contract is the defendant responsible to plaintiffs as to make a reasonable charge as testified to by the witnesses of the plaintiff in this cause."

The essence of the objection is that the jury should be required to find the actual cost of transporting, etc., rather than the reasonable cost or a reasonable charge therefor. In construing a section of the Fair Labor Standards Act, a Federal District Judge in Walling v. Peavy-Wilson Lumber Co., 49 Fed. Supp. 846, at p. 865, held reasonable cost defined as actual cost to be legally correct. And it appears to this court that if there is any difference between the two terms, "reasonable charge" is more flexible and liberal than actual cost, and if anything, favors the appellant. "Reasonable" has had many definitions by the courts and its meaning is shaded and varied by the context in which it is used, it is a relative term and the facts of a particular controversy may affect its meaning, frequently it is used to mean just, fair, honest or equitable. 36 Words & Phrases, p. 258. The special issue submitted empowered the jury to

allow for expense or cost which was not actually incurred if the jury determined such charge to be just, fair, honest or equitable. Under an actual cost inquiry, the jury would be limited to cost actually and necessarily incurred, or if not necessary, incurred in the good-faith belief that it was necessary. There is no suggestion in the argument of appellant that any evidence of the actual cost incurred in transportation, etc., of the gas was rejected by the trial court and the jury thereby deprived of considering it under the issue as given. Under facts similar to these the Supreme Court in Danciger v. Hamill Drilling Co., 141 Tex. 153, 171 S. W. 2d 321, held that the producer was liable for the fair and reasonable value of the gas. Deducting the cost of gathering and treating from the good-faith sale price in the absence of a showing of other expense arrives at its fair and reasonable value. No perceivable harm has been done the appellant by submission of the issue as worded.

The trial court rendered a take-nothing judgment on LeCuno's cross-action. The cross-action asked for a construction of the leases involved in this litigation and a reformation of the division orders. Had LeCuno pleaded and proved that it was induced to enter into the division orders by the fraud of appellees or through mutual mistake, it, of course, would be entitled to a reformation setting out the true agreement of the parties. See 36 Tex. Jur., p. 773, Sec. 31 and p. 779, Sec. 35. The record is devoid of proof of either fraud or mutual mistake, and the trial court probably on that basis was led to enter a take-

nothing judgment. However, inspection of the record shows, as has been noted in another connection, that LeCuno and those parties are under a contractual relationship growing out of the mineral leases, the declaration of unitization made by LeCuno, which unitized not only those appellees' leases but others into production units, and the division orders. The declaration of unitization was not introduced into evidence. As inspection of the gas division orders shows that others than parties to this litigation, notably, Stanolind Oil & Gas Co., Gulf Oil Corp'n, and Travis Peak Oil Corp'n, are parties to the division orders, and the division orders refer to the declaration of unitization made by LeCuno and specifically ratifies it thus making the unitization declaration a part of the division orders. By the latter documents the royalty owners guarantee and warrant to LeCuno and to each other their respective interests as set out in the orders. From this inspection of the record, it appears that there is a lack of necessary (indispensable) parties to the action for reformation. In an action for reformation all parties to the contract to be reformed whose interests may be affected (diminished or enlarged) by a judgment are necessary parties. See 36 Tex. Jur., p. 767, Sec. 28. It was held in Veal v. Thomason, 138 Tex. 341, 159 S. W. 2d 472, that lessors of unitized acreage are joint owners or joint tenants of royalties reserved in each of the several leases. A reformation of the royalty interest warranted by the appellees would affect (diminish or increase) the royalty interest of other royalty owners signing the division orders. The trial court should have dismissed the cross-action when it became apparent that

there was a lack of necessary parties. Having failed to do so, it becomes the duty of this court to order the cross-action dismissed and the judgment of the trial court reformed in that respect. See King, et al. v. Commissioners' Court, et al., 30 S. W. 257, and authorities collated under Sec. 88, Tex. Jur. p. 128.

Appellant requested the court to give eight special issues, the request was refused. The issues requested would have submitted the case either upon a theory similar to that upon which it was submitted as mentioned in the discussion of Special Issue No. 2 or upon appellant's theory that the OPS ceiling price and the FPC rate had application to the controversy. Having found that the submission made by the trial court was a satisfactory and proper submission of the ultimate controlling issue made by the pleading and proof and the orders of both federal agencies were immaterial to the issues in this case, there was no error in refusing the requested issues.

Complaint is also made by appellant to the admission in evidence of the opinion expressed by an expert witness that no charge should be made for the processing of gas produced from the various leases. The admission of expert testimony being to a great extent within the discretion of the trial judge and the testimony being the opinion of a witness whose qualification is not attached by appellant, it is thought that the testimony as limited by the judge was admissible as an expression of the expert witness's opinion of reasonable cost incurred in gathering and processing the gas, and the weight to be given it was for the jury to determine.

All of appellant's points of error have been carefully studied and no reversible error found, the judgment of the trial court is affirmed, except as to the cross-action, and the judgment on the cross-action is ordered reformed and the cross-action dismissed.

T. C. CHADICK

Chief Justice

September 26, 1957.

Filed September 26, 1957.

P. O. Box 1590
Jacksonville, Texas

October 24, 1951

Mr. O. D. Judd, Chief
Petroleum Branch
Office of Price Stabilization
Washington, D. C.

In Re: Gas Contract Approval
LeCuno Oil Company.

Dear Sir:

Dan Lester, Leonard Culbertson and Summers A. Norman, d b a LeCuno Oil Company, respectfully make application as per Section 23a(c)(3)(ii) of Ceiling Price Regulation 17, Amendment 1, to your body for approval of their gas contract with the Mississippi River Fuel Corporation for the sale of gas in the Waskom Field, Harrison County, Texas, which order authorizes the Director of Price Stabilization to approve in-line area ceiling prices for the sale of natural gas.

(1) For the sale of natural gas in the Waskom Field, Harrison County, Texas, we respectfully request a ceiling price of 10¢ per M.C.F. at the "wellhead".

It is understood by the writer that 10¢ per M.C.F. is the established ceiling price made by OPS in the Harrison County, Texas area, for sale of natural gas at the "wellhead" on a pressure of 14.65 P.S.I. for the first two years of the contract, and the same price established and con-

forms to the ceiling price of other sellers of the same class for gas produced in this area.

(2) *It is specifically requested that approval be given for 2¼¢ for gathering, dehydration and compression charges.*

The gathering charges are to be ¾ of a cent per M.C.F. for high pressure gas and 1¾ of a cent per M.C.F. for low pressure gas; compression charges are specified as being 1¢ per stage for M.C.F. with a 2% maximum; dehydration charges are specified as being ¼¢ per M.C.F.

By way of explanation, we are to dump gas into the Mississippi River Fuel Corporation line from our central dehydration and treating plant and our wells are scattered in a radius, being approximately seven miles apart, and it is necessary for us to construct gathering lines connecting the wells to our main plant and central delivery point.

The first sale of gas by us will be made on or near November 1, 1951, at the price of 10¢ per M.C.F. at the "wellhead" and the charges as outlined above will be made for gathering, compression and dehydration.

We have reached an agreement with Mississippi River Fuel Corporation wherein they agree to pay us 2¼¢ for all gas delivered as an average over-all for gathering, compression and dehydration charges. At this date, we have not sold any gas as we are making connections as of November 1, 1951, at which time we hope to connect at least five wells to the Mississippi River Fuel Corporation pipeline at our central station, after we have gathered, dehy-

drated and compressed the gas, in order to maintain a delivery pressure of 1000 p.s.i. for induction into the main pipeline, as provided for in said contract.

There is enclosed herewith a conformed copy of the Mississippi River Fuel Corporation contract for your information and if there is any further information you may desire in this connection, please do no hesitate to advise us.

Respectfully yours,

Dan Lester
Leonard Culbertson
Summers A. Norman
d/b/a LeCuno Oil Company

By:
Summers A. Norman

Office of Price Stabilization
Washington 25, D. C.

In reply refer to: 2163

Docket No. C.P.R. 17 Sec. 23-63-12 January 3, 1952

LeCuno Oil Company
P. O. Box 1590
Jacksonville, Texas

Attention: Mr. Summers A. Norman

CPR 17, Amdt. 1, Sec. 23a, Order No. L-127

Gentlemen:

Reference is made to your application dated October 24, 1951, for approval of your proposed ceiling price for the sale of natural gas produced from the Waskom Field, Harrison County, Texas under Section 23a(c)(3)(ii) of Ceiling Price Regulation 17, Amendment 1. This order authorizes the Director of Price Stabilization to approve an in-line ceiling price for natural gas.

The price you have filed for the sale of natural gas produced from the Waskom Field, Harrison County Texas under the contract submitted dated June 15, 1951, with the Mississippi River Fuel Corporation is 12 cents per MCF for the first two year period measured on a pressure base of 14.65 p.s.i.a., delivered at or near your dehydration plant located in the Waskom Field, Harrison County, Texas at a maximum delivery pressure of 1,000 p.s.i.g. and containing a minimum BTU value of 1,000 plus 1 cent per MCF for compression and $\frac{1}{4}$ of 1 cent per MCF for dehydration, with the contingent liability on the part of the buyer if the

buyer shall pay a price higher than provided in this contract—within 55 miles of central delivery point in Woodlawn Field, Harrison County, Texas for receipt of gas from Stanolind Oil and Gas Company and other producers —then such higher price shall be paid to LeCuno Oil Company.

It appears that the price provisions of your contract dated June 15, 1951, with the Mississippi River Fuel Corporation are not in line with the existing prices for the sale of natural gas produced in this same general area.

On the basis of all of the evidence available to the Office of Price Stabilization, it appears that the ceiling price for the sale of natural gas produced from the Waskom Field, Harrison County, Texas and sold under your contract dated June 15, 1951, with the Mississippi River Fuel Corporation should be: not in excess of 10¢ per MCF measured on a pressure base of 14.65 p.s.i.a. delivered at or near your dehydration plant located in the Waskom Field, Harrison County, Texas at a maximum delivery pressure of 1,000 p.s.i.g. and containing a minimum BTU value of 1,000.

After due consideration of the foregoing and pursuant to Section 23a(c)(3)(ii) of Ceiling Price Regulation 17, Amendment 1, IT IS ORDERED:

(a) That your proposed ceiling price for the sale of natural gas produced from the Waskom Field, Harrison County, Texas and sold to the Mississippi River Fuel Corporation under your contract dated June 15, 1951, is hereby disapproved.

(b) That your ceiling price for the sale of natural gas produced from the Waskom Field, Harrison County, Texas and sold under your contract dated June 15, 1951, with the Mississippi River Fuel Corporation shall be: 10 cents per MCF measured on a pressure base of 14.65 p.s.i.a. delivered at or near your dehydration plant located in the Waskom Field, Harrison County, Texas at a maximum delivery pressure of 1,000 p.s.i.g. and containing a minimum BTU value of 1,000.

(c) All provisions of Ceiling Price Regulation 17, Amendment 1, except as changed by the pricing provisions of this order, shall remain in full force and effect as far as you are concerned.

(d) This order may be amended, modified or revoked at any time by the Director of Price Stabilization.

A copy of this order has been filed with the Recording Secretary of the Office of Price Stabilization at Washington, D. C., where it may be examined by the public.

This order shall become effective immediately.

Very truly yours,

Michael V. DiSalle
Director
Office of Price Stabilization

BY: s/ G. Storer Baldwin
G. Storer Baldwin, Director
Transportation, Public Utilities
and Fuels Division

cc: Mississippi River Fuel Corp.
St. Louis, Mo.

January 11, 1952

Mr. G. Storer Baldwin
Director,
Transportation, Public Utilities & Fuel Divisions
Office of Price Stabilization
Washington, D. C.

In re: 2163 Docket CPR 17, Section 23-63-12
CPR, Amdt. 1, Section 23a
Order No. L-127

Dear Sir:

Reference is made to your Order Letter No. 127 which bears the date of January 3, 1952, and received by the undersigned by registered mail on January 7, 1952, at Jacksonville, Texas.

It is felt by the writers that the position of the LeCuno Oil Company has been misunderstood, and that the Order Letter referred to above, was the fruits of a misunderstanding as to the difference of gas pricing at "wellhead" and or "delivery point".

Your attention is called to paragraph 2 of your Order Letter, wherein you erroneously state, that the price under the contract submitted between the Mississippi River Fuel Corporation and the LeCuno Oil Company was 12¢ per MCF on a pressure base of 14.65 p.s.i.a. and at a delivery pressure of 1000 p.s.i.g. and containing B.T.U. value of 1000; plus a 1¢ per MCF charge for compression and ¼ of 1¢ per MCF for dehydration. The delivery and processing

charge thus stated are in fact not as outlined in our letter dated October 24, 1951. However, in reality, LeCuno's request was for a "wellhead" price of 10¢ per MCF, the same being the "wellhead" price that was granted to Stanolind Oil and Gas Company, et al. in the Woodlawn Field, Harrison County, Texas, and the ceiling price which was established by your Order Letter of August, 1951, and which was represented to the Oil and Gas Industry to be your ceiling price for this area.

LeCuno's request of October 24, 1951 was definitely a request of 10¢ per MCF based upon a 14.65 p.s.i.a. at "wellhead", and nothing more. It was felt, in order to be fair with the Office of Price Stabilization that the service charges for gathering and preparing the gas for pipeline delivery to a central delivery point should be broken down so as to show the reasonableness of them. In doing so, we are fearful that we have confused the issue.

Therefore, it is specifically requested that your file in this matter be reviewed and that LeCuno be granted a 10¢ "wellhead" delivery price per MCF at a pressure base of 14.65 p.s.i.a. for the gas sold from Waskom Field in Harrison County, Texas, which is commensurate with the ceiling price heretofore definitely established and set out for Stanolind, et al, in the Woodlawn Field in Harrison County, Texas, both of which fields are in close proximity to each other and whose gas is of the same nature and grade and being purchased by the Mississippi River Fuel Corporation.

Representatives of our company met with your Committee yesterday outlining our position in this matter and

we want it clearly understood that we are not asking for an increase in the ceiling price for our gas, but rather that your Order conform to the ceiling price heretofore established in the Woodlawn Field, Harrison County, Texas.

We wish to further emphasize that we feel that this ceiling price established by you in the Woodlawn Field is certainly not in excess of what the prices would have been had it not been for the present emergency. However, as stated hereinbefore, we feel that the ceiling price as outlined in your letter to us is discriminatory in relation to the ceiling price as so established.

We respectfully request therefore, that an amended order be issued by your Authority for an in-line price of 10¢ per MCF based upon a 14.65 pressure base of gas delivered at wellhead, rather than at a central delivery point as heretofore provided in your Letter Order referred to in the preamble hereinabove.

Very truly yours,

Dan Lester

Leonard Culbertson

/s/ Summers A. Norman

Summers A. Norman

DBA LECUNO OIL COMPANY

cc: Mississippi River Fuel Corp.

OFFICE OF PRICE STABILIZATION
Washington 25, D. C.

In reply refer to: 2163

Docket No. CPR 17, Sec. 23-63-12

January 23, 1952

Le Cuno Oil Company
P. O. Box 1590
Jacksonville, Texas

Attention: Mr. Summers A. Norman

Amendment No. 1 to Order No. L-127 under
Ceiling Price Regulation 17, Amdt. 1, Sec. 23a.

Gentlemen:

Reference is made to your application dated October 24, 1951, for approval of your proposed ceiling price for the sale of natural gas produced from the Waskom Field, Harrison County, Texas under Section 23a(c)(3)(ii) of Ceiling Price Regulation 17, Amendment 1, and to our Letter Order No. L-127 dated January 3, 1952.

Our order No. L-127 should have established the same price for Waskom as was established for Woodlawn since both fields are in the same general producing area. The Director established a ceiling price of 10 cents per MCF for gas delivered at the wellhead in the Woodlawn Field by Letter Order No. L-50, dated August 22, 1951, but Order No. L-127 established your ceiling price "at or near your dehydration plant located in the Waskom Field, Har-

rison County, Texas". It is therefore necessary to amend Order No. L-127 to read "delivered at the wellhead" so that the price established for both fields will be the same.

After due consideration of the foregoing, IT IS ORDERED:

(a) That paragraph (b) of Letter Order No. L-127 is amended to read as follows: "(b) That your ceiling price for the sale of natural gas produced from the Waskom Field, Harrison County, Texas and sold under your contract dated June 15, 1951, with the Mississippi River Fuel Corporation shall be 10 cents per MCF delivered at the wellhead measured on a pressure base of 14.65 pounds."

(b) All provisions of Letter Order No. L-127, except as changed by this amendment thereto, shall remain in full force and effect as far as you are concerned.

A copy of this amendment has been filed with the Recording Secretary of the Office of Price Stabilization at Washington, D. C. where it may be examined by the public.

This amendment shall become effective immediately.

Very truly yours,

Michael V. DiSalle
Director
Office of Price Stabilization

BY: s G. Storer Baldwin

G. Storer Baldwin, Director
Transportation, Public Utilities
and Fuel Division

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before
Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith and Seaborn L. Digby.

In the Matter of

Compliance by natural-gas producers and gatherers with certificate and rate requirements

Docket No. R-138

ORDER NO. 174

REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, AND WAIVER OF ACCOUNTING REQUIREMENTS

• • • • •

§154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"* — (a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms

and conditions of service and all rates and charges for such transportation or sale effective on June 7 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show billing determinants and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

§154.93 *Rate Schedule Defined*—For the purpose of Section 154.91 through 154.102 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the

rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§154.94 *Changes in Rate Schedules*—No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954, but prior to September 15, 1954, may be filed within said period without thirty days' prior notice, which notice is hereby waived. If the Commission in any case shall find it necessary to suspend any such proposed change, the suspension period will begin with the designated effective date of such change.

With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and date: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before

Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper and Seaborn L. Digby.

In the Matter of

Compliance by natural-gas producers and gatherers with certificate and rate requirements

Docket No. R-138

ORDER NO. 174-A
(SUPERSEDING ORDER NO. 174)

ORDER PRESCRIBING REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, AND WAIVER OF ACCOUNTING REQUIREMENTS

* * * Sec. 154.92 *Filing of Rate Schedules by Producer-Gatherer "Natural-gas Companies"*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954.

To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show billing determinants and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of purchasers, State Commissions, municipalities or other public agencies to whom such material has been mailed.

Sec. 154.93 *Rate Schedule Defined*—For the purpose of Section 154.91 through 154.102 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to

such rates or charges, applicable to the transportation of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

Sec. 154.94 *Changes in Rate Schedules*—No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section.

Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission not less than 30 days nor more than 60 days prior to the date such change in rate schedule is proposed to be made effective.

The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective

date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule.

Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

With each change in rate schedule there shall be submitted reasons, nature and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 months immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved. Such data shall show the effect of all billing determinants.

If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of purchasers, State commissions, municipalities or other public agencies to whom such material has been mailed.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before

Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matters of

Compliance by natural-gas producers and gatherers with certificate and rate requirements

and

Consideration of the desirability of rules concerning automatic escalation and favored nation clauses in contracts by interstate natural-gas companies with producing companies

Docket No. R-138
Docket No. R-137

ORDER NO. 174-B

ORDER AMENDING ORDER PRESCRIBING REGULATIONS GOVERNING THE FILING OF RATE SCHEDULES AND APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENENCE AND NECESSITY BY PRODUCERS AND GATHERERS OF NATURAL GAS WHICH ARE ALSO NATURAL GAS COMPANIES, WAIVING ACCOUNTING REQUIREMENTS, AND RELATING TO AUTOMATIC ESCALATION AND FAVORED NATION CLAUSES IN CONTRACTS FOR THE SALE OF NATURAL GAS BY SUCH PRODUCERS AND GATHERERS

• • • • •

§154.92 *Filing of Rate Schedules by Independent Producer.*—(a) *Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954.* To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing

there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf. annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this Section file a statement shrowing (1) the approximate annual volume involved, (2) the rate charged therefor, (3) the name of the purchaser, and (4) the geographical location (field, county, and State) at which delivery is made.

§154.93 *Rate Schedule Defined.*—For the purpose of Sections 154.92 through 154.101 hereof "*Rate Schedule*" *shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.*

§154.94 *Changes in Rate Schedules.*—(a) *No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the* jurisdiction of the Commission *by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursu-*

ant to Section 4(d) of the Natural Gas Act and in accordance with this section.

(b) *Every change in any rate schedule, rate, charge, classification or service* effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, *or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission in duplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.*

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Com-

mission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule there shall be submitted reasons, nature, and basis for the proposed change, and the following information and data: (i) the date on which such filing is proposed to be made effective; (ii) a comparative statement of sales made and revenues therefrom by months under the then effective rate schedule and under the proposed changed rate schedule, or rate, charge, classification or service contained therein for the 12 months immediately preceding and for the 12 month immediately succeeding the proposed effective date of the rate schedule tendered for filing. Actual data shall be used wherever possible and any estimates shall be so designated and explained. The statement shall be subdivided by customers and delivery points when more than one is involved.

(f) If the proposed change in a rate schedule will result in an increase in a rate or charge, there shall also be submitted a full statement in support of such increase. A complete copy of all material shall be furnished to each party to the rate schedule. With each such filing there shall be submitted a list of the parties to whom such material has been mailed.

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SUPREME COURT, U. S.

No. 937

In the

Supreme Court of the United States

OCTOBER TERM, 1957

LECUNO OIL COMPANY,

Petitioner,

against

T. P. SMITH, JR., Individually and as Trustee, HAZEL COCKE JOBE and Husband, CLEVE B. JOBE, CAL COCKE TRAMMELL, and WINSTON TAYLOR,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' ANSWER TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

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No. 937

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PETITIONER'S REPLY TO RESPONDENTS' ANSWER TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

The Petitioner hesitates to burden this Court with its reply to Respondents' Answer to the Petition for Writ of Ceriorari prayed for in this Court. However, the Petitioner feels that such reply might be of some benefit to this Court in the consideration of this matter.

In Respondent's Answer no attempt is made to justify the actions of the lower courts on the following points:

(1) The refusal of the Trial Court to permit the orders of the Office of Price Stabilization to be presented before the jury on the ground that the orders were hearsay and could be ignored.

(2) The refusal of the Trial Court and the other courts of Texas to take judicial knowledge of the orders of the Office of Price Stabilization when the original orders were presented wherein the price of the gas sued for was fixed at ten cents per M. C. F.

(3) The Judgment of the lower courts requiring this Petitioner to retroactively violate the rulings of the Office of Price Stabilization after the expiration of said authority, even with the admission of all parties that the Petitioner had paid the full price fixed by the orders of the Office of Price Stabilization.

(4) The Judgment of the lower courts in Texas requiring the Petitioner to violate the orders of the Federal Power Commission and pay more for gas and charge less for transportation than was being paid for gas, or received for transportation, processing and delivery at the time the Federal Power Commission issued its orders freezing all prices for the payment of gas purchased, and for payment of transportation, processing and delivering costs.

(5) The failure of the Respondents to first exhaust their remedies allowed by the Federal Power Commission rules and regulations before seeking relief in Court.

However, the Respondents in their reply to the Petition for Writ of Certiorari, and in their claims in the original proceedings, seek to take advantage and to claim a benefit from the contract between the Petitioner and the Mississippi River Fuel Supply Company despite the order of the Office of Price Stabilization fixing the price to be paid to the Respondents for gas purchased at the well-head, and despite the order of the Federal Power Commission freezing the price to be paid as of June 19, 1954, as shown in the rate schedules required to be filed by all engaged in handling gas in Interstate Commerce.

A.

The Respondents state on Page 2:

> "The Respondents herein have never at any time questioned any rulings of the Office of Price Stabilization or the Federal Power Commission."

However, the record is clear and without dispute that Respondents objected to every order of the Federal agencies on the grounds that each order was hearsay, and they secured a ruling from the Trial Judge which did not even permit the orders to be read to the jury.

It is indisputable that the judgment below gives to the Respondents three quarters of a cent per M. C. F. *more for gas than was allowed by the Office of Price Stabilization.* Respondents may not question the order, but they have secured a judgment which requires the Petitioner to violate such order!

Every royalty holder in all of Texas had basically the same kind of a lease. If the order of Price Stabilization

does not apply to Respondents, the court houses of Texa will be flooded with petitions and suits asking for mor money from every oil and gas producer because if the orde of the Office of Price Stabilization is to be ignored in on instance, it must necessarily be ignored wherever peopl desire to violate the rules of our Federal agencies. During the time that the Office of Price Stabilization was in exist ence, it fixed the price of Respondent's gas at 10¢ per M. C. F. at the well-head. *This is admitted now, but was disputed in the Trial.* Petitioner paid the full 10¢ every month. In the face of the statute prohibiting retroactive judgments, Respondents seek to recover three quarters of a cent per M. C. F. more than the 10¢ order. How can you find a more flagrant violation of a Federal statute and the orders of a Federal agency?

B.

The Federal Power Commission in 1954, issued its order under No. 174 to follow the decision which this Honorable Court issued in the *Phillips* case. It ordered the filing of all contracts as rate schedules and froze all prices at the figures shown in the rate schedules. Petitioner *paid the prices shown* in the rate schedules filed and *charged for transportation*, processing and delivering *the charges set forth in this rate schedule*. In addition, Petitioner requested the Federal Power Commission for an increase which request was refused.

If Petitioner pays to Respondents the amounts required to be paid by the judgment of the courts in Texas, it must violate the orders of the Federal Power Commission. If it

does, who is going to get it out of jail? When an order of the Federal Power Commission is held to be hearsay and is refused as evidence by a court in Texas. how can a pipe line company or a producer secure relief. The courts in Texas refused to consider the orders!

Petitioner has steadfastly, lawfully and with loyalty followed each order of the Office of Price Stabilization and the orders of the Federal Power Commission. Is Petitioner entitled to be protected by this Honorable Court? While this cause does not involve a great deal of money, it does involve the stability of the orders of the Federal agencies and the right of the citizens to be protected when they follow such orders.

The Respondents' theory is that this is a simple accounting suit. That is correct. It is a suit for an accounting for gas wherein they seek to recover more than the price fixed by the Office of Price Stabilization. They seek to recover *more than the price frozen* by the Federal Power Commission and to reduce the charge made for transportation, processing and delivery of the gas sold in Interstate Commerce from the charge shown in the *rate schedules* filed with such commission under its orders.

Respondents seek more than the Federal agencies have allowed Petitioner to pay. The Office of Price Stabilization has held that Petitioner can not pay more than the 10¢ which has already been paid. Respondents and the lower courts in Texas have said Petitioner must pay more, i.e. three quarters of a cent per M.C.F. more. Which shall prevail?

The record shows and it is admitted that Petitioner paid the amount shown by the orders which were refused to be admitted in evidence. If Petitioner does not pay, its property is subject to sale under execution. If it does pay, it violates the law! Again, we ask where can Petitioner secure relief except from this Honorable Court?

Petitioner verily believes that this Petition should be granted and the cause summarily reversed and rendered, or reversed and remanded to the Trial Court as prayed for in the Petition for Writ of Certiorari.

Respectfully submitted,

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CLARENCE A. ABRAMSON,
Of Counsel.

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Office - Supreme Court, U.S.
FILED
MAY 21 1958
JOHN T. FEY, Clerk

No. 737

In the

Supreme Court of the United States

OCTOBER TERM, 1957

LECUNO OIL COMPANY,
Petitioner,

against

T. P. SMITH, JR., Individually and as Trustee, HAZEL COCKE JOBE and Husband, CLEVE B. JOBE, CAL COCKE TRAMMELL, and WINSTON TAYLOR,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

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No. 937

In the

Supreme Court of the United States

OCTOBER TERM, 1957

LECUNO OIL COMPANY,

Petitioner,

against

T. P. SMITH, JR., Individually and as Trustee, HAZEL COCKE JOBE and Husband, CLEVE B. JOBE, CAL COCKE TRAMMELL, and WINSTON TAYLOR,

Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondents pray that a Writ of Certiorari be denied to review the judgment of the Court of Civil Appeals, Sixth Supreme Judicial District of Texas, sitting at Texarkana, Texas, and in which the Supreme Court of Texas refused a Writ of Error on January 15, 1958, Rehearing Denied February 26, 1958. (R. 20.)*

*References marked "R" are to the Certified Record.

JURISDICTION CHALLENGED

The Petitioner seeks to invoke the jurisdiction of this Honorable Court pursuant to the provisions of 28 USCA, Sec. 1257(3). The Respondents respectfully disagree that this Court has jurisdiction in this case. The Respondents herein have never at any time questioned any rulings of the Office of Price Stabilization or the Federal Power Commission, and from its inception have always proceeded in this case on the one theory that the Petitioner was not accounting to the Respondents for their royalty interest in accordance with the terms of the oil and gas leases owned by Petitioner.

As is shown from opinion of the Court of Civil Appeals, *LeCuno Oil Company v. Smith, et al., 306 S. W. 2d, Page 190, at page 192:*

> "* * * In an original and later an amended answer Appellant (Petitioner here) pled defensively that the subject matter in controversy was within the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U. S. C. A., Sec. 717 et seq., and that all rates, charges and field prices or changes therein for the royalty gas must be set by that agency. * * *." (R. 1, page 29.)

The Respondents are citizens and landowners of Harrison County, Texas, where the land and oil, gas and mineral leases in question are located.

The Petitioner is a partnership composed solely of citizens of Texas, who acquired by assignment, oil, gas and mineral leases on Respondents' lands, and drilled gas wells

which have been producing during the time in question. Following the completion of the wells, the parties entered into gas division orders which provide the following basis upon which royalty should be computed, viz.,

> "Gas received under this division order shall be paid for to the parties entitled thereto according to the division of interest set out above *at the price received at the wells by LeCuno;* settlement therefor to be made on or before the 25th of each month for all gas taken during the previous month, or previous meter period if different from a calendar month, but settlement is to be made at least once each month."

This agreement remained in effect during the period involved in this lawsuit.

On June 15, 1951, the Petitioner entered into a Gas Sales Contract with Mississippi River Fuel Corporation, providing for sale of the gas produced at a central point agreed upon by the parties to said contract, and fixing the price, as follows:

> "(a) During the two years beginning at the date hereof — 12¢
> "(b) During the next two years of the term hereof — 13¢."

This contract remained in effect during the period in question, and the Petitioner was actually paid by Mississippi River Fuel Corporation in accordance with the terms of said contract. A small portion of the gas produced was sold to Texas Eastern Transmission Company, and the same charges were made as in the case of Mississippi River Fuel Corporation.

The Respondents have conceded at all times that the Petitioner is entitled to a reasonable charge for gathering, transporting and processing gas produced from the wells in question and delivered to the central point which is designated in the contract.

The jury found that 1.25¢ per MCF was a reasonable charge for the service rendered. Judgment was entered for the Respondents for the difference between the charge found to be reasonable by the jury, and 2¢ per MCF which was arbitrarily deducted by the Petitioner without consent of Respondents before it accounted to the Respondents (royalty owners) for the money due to them under their respective leases and the division orders.

Thus, this Court has before it a suit between Royalty Owners who entered into oil, gas and mineral leases held by Petitioner for an accounting to them of moneys received by the Petitioner from gas produced and sold pursuant to terms of a Gas Sales Contract.

At all times, the Petitioner was paid for gas produced and sold in accordance with the terms of its contract. No regulatory body interferred with full payment, and, in fact, approved of the sales price for gas sold at a central delivery point.

The record shows repeated efforts by the Petitioner to obtain a decision from the Office of Price Stabilization, but on January 3, 1952, the Office of Price Stabilization disapproved the Petitioner's request (R.), in its reply of January 3, 1952. (Appendix, pages 28, et seq.)

The Office of Price Stabilization held:

"(b) All provisions of letter order L 127, except as changed by amendment thereto shall remain in full force and effect as far as you are concerned." (R. .)
(Appendix, pages 28, et seq.)

Therefore, the Office of Price Stabilization refused at all times to approve of a charge of 2¼¢ for gathering, compression and dehydration charges.

There is no question of a wellhead sale in this case; no market was available at the wellhead, so the producer transported the gas to a point of sale some distance from the wells. The Office of Price Stabilization specifically refused to pass upon the reasonableness of charges which are involved in this lawsuit.

The Federal Power Commission has approved of the contractual price for the sale of gas at a central delivery point. At no point has this Body gone behind the price fixed at the central delivery point and regulated the gas producer.

The Respondents have sought an accounting for the money due them because the Courts have held that the Federal Power Commission is not a proper body to award money judgments.

AUTHORITIES

In the case of *Magnolia Petroleum Company v. Texas Illinois Natural Gas Pipeline Company, 130 Fed. Supp.*

890, 4 Oil & Gas Reporter, 408-411, Judge Connally ruled on a motion to dismiss, as follows:

> "But the Commission has no authority to award a money judgment if in fact the plaintiff be entitled thereto; and when reached for a trial on the merit, this Court may determine what the lawful rate may have been at the time in question (whether fixed by contract or by commission order), and may further enter such judgment as the facts warrant."

In *Albright v. Teas, 106 U. S. 613, 1 S. Ct. 550, 27 Lawyers' Edition 295*, we had a suit for discovery, for an accounting of sums due because of royalties payable under a contract, and other matters. The defendants filed a petition for removal of the cause to the Circuit Court, on the theory that the suit was one arising under the Patent laws of the United States. The Circuit Court remanded the suit on the grounds that the case was not one arising under the Patent laws of the United States, but was a suit for accounting and relief for the settlement of controversies existing under a contract. The Court held that the suit, notwithstanding the collateral inquiry about the patent, still remained a suit on the contract to recover royalties, and was not a suit upon a patent and that the Federal Court lacked jurisdiction. In the present case, the Respondents have never questioned any of the orders of the Office of Price Stabilization or the orders of the Federal Power Commission.

In *Vandervoer v. Erie Malleable Iron Company, 238 Fed. Reporter 2d 510, at page 513*, we find the following:

> "Although the bringing of actions arising under the Patent laws is admittedly restricted to the Federal

Courts, it has long been established that actions brought to enforce contracts of which a patent is the subject must, in the absence of diversity of citizenship, be brought in the State Courts. * * *."

In *Avon Publishing Company, Inc. v. American News Company, Inc., 143 Fed. Supp. 516*, we had a suit brought for relief under the Federal Anti-Trust Laws for temporary injunction, whereby the plaintiffs sought to enjoin the defendants from prosecuting a suit in the New York State Supreme Court, in which the present plaintiffs were defendants. In the State Court action, plaintiffs sued defendants for monetary damages on the basis that a contract was fraudulent and void. The defendants (plaintiffs in this suit) answered by pleading affirmatively an anti-trust claim against the plaintiff. Prior to the State Court action the parties instituted a suit in Federal Court regarding the anti-trust violations. The Court in refusing to enjoin the State Court from taking any action until the Federal Court matter had been disposed of, held that the State Court action (which was based solely on a contract for damages), could not be enjoined even though anti-trust laws, the violation of which constituted a Federal matter, had been interposed as a defense in the State action.

The petitioner contends that the Respondents should exhaust all administrative remedies before resorting to the Courts, whereas in the case of *Magnolia Petroleum Company v. Texas Illinois Natural Gas Pipeline Company*, supra, Judge Connally expressly held that the Federal Power Commission could not award a money judgment, but that such action would have to be determined by the Courts.

Petitioner has fully tried its case before the Trial Court, Court of Civil Appeals, and Supreme Court of Texas. It now complains of action of these Courts in following the established law of Contracts in the State of Texas.

The Office of Price Stabilization and Federal Power Commission have approved payment. The purchasers of natural gas (Mississippi River Fuel Corporation and Texas Eastern Transmission Company) have paid in accordance with approved practices on the basis of the provisions in their contract. Now we come to a simple proposition of whether or not the producer of natural gas should be permitted to arbitrarily fix a charge without notice or hearing for gathering, compressing and processing natural gas sold from wells on Respondents' land, or whether the Petitioner should be required to account to the royalty owners (Respondents herein) upon the basis of its contract, no regulatory body having intervened and having fixed the charge to be made.

CONCLUSION

Since no rule or regulation fixing a charge was entered by the Office of Price Stabilization, and since no rate schedule fixing a charge has been approved for the Federal Power Commission, effective during the period involved in this lawsuit, the Respondents properly filed their suit for the money that was due them under their contract with Petitioner in the District Court of the State of Texas, which properly had jurisdiction of this cause of action.

Wherefore, Respondents respectfully pray that the Petition for Writ of Certiorari be, in all things, denied.

Respectfully submitted,

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